

UNITED STATES BANKRUPTCY COURT

DISTRICT OF SOUTH CAROLINA

In re:

Raymond Quinn Herndon,

Debtor.

Case No. _____

FILED

2006 DEC 21 PM 4:06

U.S. BANKRUPTCY COURT
DISTRICT OF SOUTH CAROLINA

ENTERED

DEC 21 2006

S. L. G.

JUDGMENT

Based upon the Findings of Fact and Conclusions of Law as recited in the attached Order of the Court, the Court finds that Debtor's "Petition to File Bankruptcy" fails to commence a case under the Bankruptcy Code. Accordingly, Debtor's case is hereby dismissed *ab initio* without prejudice.


UNITED STATES BANKRUPTCY JUDGE

Columbia, South Carolina,
December 20, 2006

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ORDER

This matter comes before the Court pursuant to correspondence from Raymond Q. Herndon ("Debtor"), which enclosed a handwritten document, entitled "Petition to File Bankruptcy" (the "Petition"). The issue for determination by the Court is whether the Debtor has commenced a case under the Bankruptcy Code. The Court makes the following findings of fact and conclusions of law:¹

FINDINGS OF FACT

1. Debtor submitted the Petition to the Court on December 4, 2006. Debtor is a prisoner at the Hampton Roads Regional Jail in Portsmouth, Virginia. Debtor is not represented by counsel.²

2. The Petition purports to request bankruptcy relief, but does not specify the chapter under which Debtor is seeking relief. No statements or schedules were attached to the Petition and no filing fee or application regarding same was submitted.

¹ To the extent the Court's findings may be construed as conclusions of law, they are so deemed. To the extent any conclusions may be construed to be findings of fact, they are so deemed.

² Debtor stated in his correspondence with the Court that his wife, Rosemary C. Hayes notified the Court on record that she would be his power of attorney in his future bankruptcy case. The Court has no record of this power of attorney. The correspondence also indicates that Debtor intends for his wife to send him the Federal forms so he can file bankruptcy. The Court believes this indicates that Debtor did not have a present intent to file bankruptcy with this correspondence.

3. The Petition provides Debtor's social security number, the names of his creditors, the amount of the debt, and the signature of Debtor.³

4. Debtor also did not file a certificate indicating that he has received credit counseling from an approved, non-profit budget and credit counseling agency. Debtor has made no claim that he suffers from a disability or incapacity or that he is on active military duty in a combat zone, which would exempt him from the requirement of prepetition credit counseling.

CONCLUSIONS OF LAW

11 U.S.C. § 301 provides that "[a] voluntary case under a chapter of this title is commenced by the filing with the bankruptcy court of a petition under such chapter by an entity that may be a debtor under such chapter." Fed. R. Bankr. P. 1002(a) further provides that a "petition commencing a case under the Code shall be filed with the clerk." The Rules also require a debtor to include the filing fee with his petition. If the debtor cannot pay the filing fee at the time of the filing of the petition, he must include either an application to pay filing fee in installments or an application requesting a waiver under 28 U.S.C. § 1930(f). Fed. R. Bankr. P. 1006.

The appropriate formats of the petition and applications are provided by the Official Forms, which are prescribed by the Judicial Conference of the United States. Fed. R. Bankr. P. 9009 provides that the Official Forms shall be observed and used with alterations as may be appropriate.⁴ In addition, Local Rule 1002-1 provides that the petition and all required schedules, statements and lists must be filed using the Official Bankruptcy Forms prescribed

³ The Petition also states that Debtor has a plan with which to pay the debt "over a 7 year period as prescribed by the Federal Bankruptcy Code."

⁴ The use of the Official Forms has generally been held subject to a "rule of substantial compliance." 1983 Advisory Committee Note to Rule 9009.

for these documents.

The Court finds that the Petition is fatally defective. Specifically, the Petition received by the Court did not use the format prescribed by the Official Form and therefore does not provide information critical to establish a bankruptcy case. The Petition also did not substantially comply with the format prescribed by the Official Form. Most notably, the Petition fails to specify the chapter under which the Debtor is seeking relief. See In re Vitagliano, 303 B.R. 292, 293 (Bankr. W.D.N.Y. 2003)(stating that the failure to indicate the choice of chapter in a petition is a fatal defect). The Petition also did not include a declaration under penalty of perjury that the information provided in the Petition was true and correct.

The Debtor's failure to file the filing fee, an application to pay filing fee in installments, or an application requesting a waiver provides further support for the conclusion that a case has not been commenced under the Bankruptcy Code.⁵ See id. (providing that non-compliance with Rule 1006 is also a fatal defect). Additionally, Debtor's failure to obtain prepetition credit counseling makes him ineligible to file a case under Title 11. Section 109(h)(1) states that an individual debtor is not eligible to file for bankruptcy relief unless, during the 180-day period prior to the filing of a petition, the debtor received credit counseling from an approved, non-profit budget and credit counseling agency.⁶ Although

⁵ Rule 1006 provides that "[e]very petition shall be accompanied by the filing fee except as provided in subdivisions (b) and (c) of this rule." Fed. R. Bankr. P. 1006. Subdivision (b) provides that "[a] voluntary petition by an individual shall be accepted for filing if accompanied by the debtor's signed application, prepared as prescribed by the appropriate Official Form, stating that the debtor is unable to pay the filing fee except in installments." Subdivision (c) provides that "[a] voluntary chapter 7 petition filed by an individual shall be accepted for filing if accompanied by the debtor's application requesting a waiver under 28 U.S.C. § 1930(f), prepared as prescribed by the appropriate Official Form."

⁶ The requirement of prepetition credit counseling relates to eligibility to file, not to the jurisdiction of this Court to hear this case under 28 U.S.C. § 1334 and 28 U.S.C. § 157.

certain debtors may be eligible for an exemption from counseling under § 109(h)(2)(A) and § 109(h)(4), none of these exemptions apply in this case.⁷

For the foregoing reasons, the Court finds that Debtor has not successfully commenced a case under the Bankruptcy Code.⁸ It is therefore

ORDERED that Debtor's case is dismissed *ab initio* without prejudice.

AND IT IS SO ORDERED.


UNITED STATES BANKRUPTCY JUDGE

Columbia, South Carolina,
December 20, 2006

⁷ The statute provides exemptions from this requirement for debtors on active duty in a military combat zone, debtors who are incapacitated or disabled as defined in (h)(4), and those debtors residing in districts where the UST has determined that credit counseling is unavailable. § 109(h)(2).

⁸ The Court also notes that the Petition appears to be jurisdictionally faulty as well. The Court is not convinced that venue is proper in this case under 28 U.S.C. § 1408 (West 2006), because the Debtor is a prisoner in Virginia and the property tax debt described in the Petition is on property located in Dallas, Texas. The Debtor has provided no information to the Court indicating that Debtor's domicile, residence, principle place of business, or principle assets have been located in this district for the 180 days immediately preceding the filing of the Petition.